80-608

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether 18 U.S.C. 1725, which prohibits the deposit of unstamped "mailable matter" in a letter box approved by the Postal Service, unconstitutionally abridges the First Amendment right of appellee civic associations to freedom of expression.

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OPINIONS BELOW

The opinion of the district court on remand (App. A, *infra*, 1a–12a) is not reported. The opinion of the court of appeals remanding the case to the district court (App. B, *infra*, 13a–19a) is reported at 586 F.2d 935. The original opinion of the district court (App. E, *infra*, 23a–31a) is reported at 448 F. Supp. 159.

JURISDICTION

The judgment of the district court (App. C, *infra*, 20a–21a), declaring 18 U.S.C. 1725 unconstitutional and enjoining its enforcement against appellees, was entered on May 20, 1980. A notice of appeal to this Court (App. D, *infra*, 22a) was filed on June 18, 1980. On August 6, 1980, Mr. Justice Marshall extended the time for docketing the appeal to and including October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Fleming* v. *Rhodes*, 331 U.S. 100, 104 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

18 U.S.C. 1725 provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

STATEMENT

1. This case involves the question whether 18 U.S.C. 1725, which prohibits the placement of "mailable matter"

in a letter box without paying postage, may constitutionally be applied to appellee civic organizations. The statute was enacted in 1934 "to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon, by making this a criminal offense." H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934). Postal Service Regulations interpreting the statute provide (45 Fed. Reg. 56057 (1980)):[1]

> Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections * * * 1725, except that door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 * * *.

2. The instant suit arose in 1977 when appellee Council of Greenburgh Civic Associations (an umbrella organization for a number of Westchester County civic groups) and one of the Council's member associations, appellee Saw Mill Valley Civic Association, filed suit in the United States District Court for the Southern District of New York after being advised by the Postal Service that they were subject to criminal prosecution under 18 U.S.C. 1725. The organizations had been delivering messages to local residents by placing notices and pamphlets, without postage, in letter boxes at private homes in Greenburgh, New York. Appellees contended that enforcement of the statute would interfere with the delivery of their messages and thereby deprive them of the First Amendment rights to freedom of speech and of the press.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted (App. E, *infra*, 23a–31a). Appellees appealed, and the court of ap-

[1] The regulations in effect during the litigation below were identical to the current regulations in all relevant respects (see *Domestic Mail Manual* § 151.1; App. E., *infra*, 24a–25a n.2).

peals reversed, holding that "enough is alleged in the complaint to raise the issue of infringement of freedom of communication" (App. B, *infra*, 14a). The court of appeals remanded the case to the district court to give the parties "an opportunity to submit proof as to the extent of the handicap to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other" (*ibid.*; footnotes omitted).

On remand, the Postal Service demonstrated that Section 1725 protects mail revenues, facilitates efficient and secure delivery of the mails, and promotes the privacy of mail patrons. The primary purpose of Congress in enacting the statute was to protect mail revenues; Section 1725 was intended to discourage organizations from avoiding the payment of postage by delivering their own pamphlets and circulars, while using official letter boxes as a repository. See H.R. Rep. No. 709, *supra*; 75 Cong. Rec. 5575–5577 (1932). But the testimony of postal inspectors at the evidentiary hearing showed that the statute also plays a role in the investigation of mail theft: by restricting legitimate access to letter boxes, the statute allows investigators and other observers to assume that anyone other than the postal carrier or the householder who opens a mailbox may be engaged in a violation of the law (Tr. 123–128).[2] The Postal Service also introduced evidence demonstrating that appellees had ample alternative methods of delivering their messages, such as by placing notices or pamphlets under a door or doormat or on a door knob.[3]

[2] The statute is particularly helpful in investigating thefts of government benefit checks from letter boxes in economically depressed areas (Tr. 589–591).

[3] A survey on the comparative effectiveness of different distribution methods showed (Def. Exh. D-1; Tr. 535):

METHOD USED	% OF DISTRIBUTIONS FOUND THAT WERE READ	% OF TOTAL DISTRIBUTIONS READ
Under Door or Mat	83%	59%
On Door Knob	81%	61%
In Mail Box	86%	71%

Appellees submitted evidence to show that the payment of postage would be financially burdensome to them because of their minimal resources (Tr. 22-23, 94-95, 208-209, 253) and that there are occasions when mail delivery service is too slow to satisfy their need to communicate effectively with their constituents (Tr. 22-23, 168-170, 197-199).

The district court balanced the benefits to the Postal Service[4] against the harms to appellees and concluded that "the cost to free expression of imposing this burden on [appellees] outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and protection of the mails" (App. A, *infra*, 9a). It therefore enjoined the Postal Service from enforcing Section 1725 against appellees or the Council's constituent civic associations (App. C, *infra*, 20a-21a).

THE QUESTION IS SUBSTANTIAL

The district court has declared unconstitutional, as applied to appellee civic associations, a 45-year-old, content-neutral federal statute that prohibits persons from placing "mailable matter" in letter boxes approved by the Postal Service with the intent to avoid paying the required postage. The court erred in concluding that the incidental effect of this statute on appellees' right to communicate with local residents violates the First Amendment. In light of the substantial, legitimate governmental interests served by 18 U.S.C. 1725, this Court should note probable jurisdiction to "review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).[5]

[4] The district court refused to consider the statute's benefits to the privacy interests of mail patrons on the grounds that the Postal Service could not raise such interests, and, in any event, homeowners could protect those interests by posting "no trespassing" signs or enforcing local trespass laws (App. A., *infra*, 11a, n.3).

[5] Although the district court enjoined enforcement of the statute only as to appellees, its decision places the Postal Service in substantial uncertainty regarding the lawful application of the statute to others. Unless the decision below is overturned, it can be expected that

1. Pursuant to Article I, Section 8, Clause 7 of the Constitution, granting Congress the power "[t]o establish Post Offices and post Roads," and Article I, Section 8, Clause 18, the "necessary and proper" clause, Congress has broad authority to regulate virtually all aspects of mail delivery. See *Ex parte Jackson*, 96 U.S. 727, 732 (1877); *United States Postal Service* v. *Brennan*, 574 F.2d 712, 714 (2d Cir. 1978), stay denied, 439 U.S. 1345 (1978) (Marshall, J.), cert. denied, 439 U.S. 1115 (1979); *United States* v. *Black*, 569 F.2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978); *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973).[6] That power extends to reasonable regulation of third party access to letter boxes that are required of patrons wishing customer delivery services. See *Domestic Mail Manual* §§ 155.41(a), 156.311, incorporated by reference in 39 C.F.R. 111.1.[7] These letter boxes, which must be "established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter" in order to fall within the protections of Section 1725, are an integral part of the government's constitutional duty to provide for the carriage of the mails.

Courts should defer to the congressional determination of the wisdom of legislation enacted pursuant to the Postal Power unless the statute contravenes some limitation

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numerous groups, including political and commercial as well as civic organizations, will seek to enjoin enforcement of Section 1725 on the ground that it abridges their First Amendment rights. A nationwide case-by-case adjudication of these questions, without authoritative guidance from this Court, would waste judicial resources and be unnecessarily expensive and burdensome for the Postal Service.

[6] This Court, for example, has repeatedly upheld Congress' power to designate articles that may not be sent through the mails. See *Smith* v. *United States*, 431 U.S. 291 (1977); *Public Clearing House* v. *Coyne*, 194 U.S. 497, 506-508 (1904); *In re Rapier*, 143 U.S. 110 (1892).

[7] Postal regulations requiring that letter boxes or other receptacles be used exclusively for the mail, and prohibiting the installation on rural mail boxes of metal hooks for the delivery of an advertising journal that contained local news, have been upheld against a challenge based, *inter alia*, on the First Amendment. *Rockville Reminder, Inc.* v. *United States Postal Service*, *supra*.

found elsewhere in the Constitution. *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976). By engaging in its own *ad hoc* balancing of the interests supporting the statute against the statute's impact on the operations of appellees, the district court overlooked this Court's statement that " 'great weight [must be given] to the decisions of Congress' even though the legislation implicate[s] fundamental constitutional rights guaranteed by the First Amendment." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 21, quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). It was accordingly improper for the district court to focus on what it believed to be the wisest balancing of the competing interests affected by the legislation. When the proper test is applied, we submit that any incidental impact of Section 1725 on appellees' ability to communicate with their constituents is minimal and does not amount to a violation of the First Amendment.

2. Because of the nature of its business, virtually all aspects of the Postal Service's operation have some impact on the ability of people to communicate effectively. But the enforcement of the restriction at issue here, like the refusal to allow an organization to take advantage of cheap bulk mail rates in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, (1977), does not "fundamentally implicate *free speech* values" (*id.* at 130-131; emphasis in original). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). No such restriction is involved here. There is nothing to suggest that the statute on its face, or as applied, restricts any communication because of its content. Not only are appellees free to communicate with their constituents through means other than placing notices in letter boxes without paying postage, but if they pay the requisite postage the Postal Service will deliver the notices and will place them in the appropriate letter box. Cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93-94 (1977).

Appellee's argument that the cost of postage is so "burdensome" that the requirements of Section 1725 violate the First Amendment is without merit. The guarantee of free speech does not include a constitutional entitlement to the financial resources to make maximum use of that guarantee. Cf. *Harris* v. *McRae*, No. 79-1268 (June 30, 1980); *Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977). In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra*, 433 U.S. at 130-131, for example, this Court held that a prison ban on the acceptance of bulk mailings by a prisoners' union to inmates did not infringe on the union's First Amendment rights, despite the consequent deprivation of the advantages of "cheaper rates and convenience." Likewise, free speech values are not implicated here merely because appellees are required either to pay the ordinary costs of using part of the postal system, *i.e.*, a receptacle set aside for the exclusive use of the Postal Service's customer mail delivery system (see *Rockville Reminder, Inc.* v. *United States Postal Service*, *supra*, 480 F.2d at 8), or to incur the inconvenience of delivering their messages to constituents through some means outside the postal system. Cf. *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966).

In any event, to the extent that the enforcement of the statute imposes an incidental restriction on free speech, it should be upheld as a reasonable, content-neutral regulation of the *place* of communication. As this Court recently reaffirmed, "[a] restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable." *Consolidated Edison* v. *Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 5. See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965), and cases there cited.

The restriction imposed by Section 1725 is clearly a reasonable means of furthering the legitimate interests of the Postal Service. First, as the legislative history plainly re-

flects, the statute protects against dilution of mail revenues. See, *e.g.*, *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *United States Postal Service* v. *Brennan*, *supra*. In addition, by limiting the number of people who may have access to letter boxes, the statute protects the security of the mails from theft or other tampering, and by ensuring that letter boxes are not cluttered by unmailed matter it promotes the efficient delivery of the mails. Finally, the statute is a substantial protection of the privacy interests of mail customers.[8] The privacy of the mail has a long and honored tradition in this country. See, *e.g.*, *Ex parte Jackson*, *supra*, 96 U.S. at 733. That tradition reinforces the normal expectation of residents that no one other than members of their household and postal employees will look at their mail or pry into their mail box. A letter box is not a public forum such as a street or a park, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), or even a private area such as a doorway where visitors are expected. *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943). It has only one use—to hold the householder's incoming or outgoing mail until it is picked up. The postal customer is entitled to receive and send his mail without having uninvited third parties peruse the envelopes.

Nor does appellees' alleged need to use the letter boxes justify this invasion of privacy or the interference with the governmental interests protected by the statute. This is not a situation where governmental action "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully

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[8]The district court erred in concluding that the Postal Service could not raise these privacy interests in support of Section 1725. Such notions of standing have no place in assessing the constitutionality of a federal statute. Congress has undoubted authority to enact legislation protecting the privacy of users of the mails. *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970). See *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 15; cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-304 (1974).

communicate." *United States* v. *O'Brien*, 391 U.S. 367, 388–389 (1968) (Harlan, J., concurring). Rather, the statute "leave[s] open ample alternative channels for communication of information." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 771. As shown by the survey introduced in the district court (see note 3, *supra*), civic associations such as appellees can communicate effectively with their constituents by using a number of feasible alternatives. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra*, 433 U.S. at 130–131. Compare, *e.g.*, *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938).

In sum, Section 1725 does not infringe on appellees' First Amendment rights. The statute furthers important interests of the Postal Service and the recipients of mail matter, and it has only the most incidental impact on freedom of expression. Hence, Congress "has exercised its power to regulate [postal matters] in such a manner as not unduly to intrude upon the rights of free speech." *Village of Schaumberg* v. *Citizens for a Better Environment*, *supra*, 444 U.S. at 633.

CONCLUSION

Probable jurisdiction should be noted.[9]

Respectfully submitted.

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[9]The Court may wish to consider summary reversal.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIL ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT

OPINION AND ORDER

CONNER, D. J.:

This action is brought by an umbrella organization for numerous Westchester County civic associations, The Council of Greenburgh Civic Associations, and one of the Council's member associations, the Saw Mill Valley Civic Association. Plaintiffs seek, on First Amendment grounds, declaratory and injunctive relief from the Postal Service's threatened enforcement of 18 U.S.C. § 1725[1] with regard to the activities of plaintiffs and other Council members in depositing unstamped flyers and notices in mailboxes of private homes located in the Town of Greenburgh. Plaintiffs further seek similar relief on behalf of "others similarly situated."

The case is before this Court on remand from a decision of the Second Circuit Court of Appeals directing this

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[1] That section reads as follows:

"§ 1725. Postage unpaid on deposited mail matter

Whoever knowingly and willfully deposits any mailable matter such as statement of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300."

Court to give the parties an opportunity to submit proof as to (1) the nature and extent of the handicap to plaintiffs' ability to communicate with their constituents if the statute is enforced (thus restricting plaintiffs to use of the mails or to alternative means of house-to-house distribution) and (2) the opposing interest of the Postal Service in enforcing the statute as to these plaintiffs, particularly the Postal Service's interest in preventing mailbox overcrowding, promoting the security of the mails, and protecting mail revenues. *Council of Greenburgh Civic Associations* v. *United States Postal Service*, 586 F.2d 935 (2d Cir. 1978). This Court heard testimony on these issues on June 28 and July 5 and 6, 1979.

This opinion and order incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

LEGAL STANDARD

Both the majority opinion for the Second Circuit and Judge Kaufman in his concurring opinion suggested that the named plaintiffs[2] would be entitled to relief if the testimony at trial indicated that, on balance, the curtailment of plaintiffs' interest in free expression resulting from enforcement of the statute substantially outweighed the government's interest in the effective delivery and the protection of the mails. 586 F.2d at 936–37. Judge Kaufman further suggested, see 586 F.2d at 937, that plaintiffs might be entitled to relief on a showing of a less substantial curtailment of their interest in free expression if the testimony at trial indicated that the deposit of circulars in mailboxes constituted such an established means of com-

[2] The Circuit Court did not consider plaintiffs' contention that the Postal Service should also be enjoined from prosecuting under the statute other, similar, noncommercial local civic associations since this is not a class action, and, in pre-trial conferences, plaintiffs indicated that they sought relief only for themselves and their members. See this Court's opinion below, No. 77 Civ. 483 (S.D.N.Y., filed March 29, 1978) (Conner, J.), granting defendant's motion to dismiss under Rule 12(b), F.R.Civ.P.

munication that the mailboxes could be considered a public forum within the meaning of cases such as *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); and *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), and if the evidence further showed that the statute as applied did not constitute a reasonable restriction of time, place and manner upon the use of that forum, see *Grayned*, *supra*, 408 U.S. at 116–17.

TESTIMONY AT TRIAL

A. BURDEN ON PLAINTIFFS' ABILITY TO COMMUNICATE

1. Burden flowing from use of the mails

The evidence at trial establishes that use of the mails is financially burdensome to plaintiffs and constitutes a significant impediment to plaintiffs' ability to communicate quickly with their constituents. Numerous witnesses testified to the small or nonexistent cash reserves of the neighborhood civic groups represented by the umbrella organization of the Council of Greenburgh Civic Associations, as well as to the small cash reserves of the Council itself. Trial transcript ("Tr.") at 23, 94–95, 150–51, 208–09, 253. Plaintiffs' witnesses also testified that the majority of Greenburgh neighborhood associations, because of their size or tax status, were not eligible for bulk

mail or charitable organization mail rates; that the majority of such groups could not afford even those reduced rates on a regular basis; and that the updating of the address lists necessary for a mailing and the addressing of envelopes or folded flyers constituted a significant administrative burden on a small volunteer civic group. See, *e.g.*, Tr. at 22–23, 82, 108. Defendants did not contradict this testimony, except to indicate that certain larger civic associations might qualify for bulk mail rates if they could pay the initial fee.

Plaintiffs' witnesses further testified that much of the business of local civic associations concerns activities of local government bodies—town and village boards, school boards, and the like; and that the agendas for such meetings are often available only a short time before the meetings, or that matters come up without being placed on a prepared agenda, so that notice must often be given to constituents within a very short time. Tr. at 22, 152, 214–15, 340. The mail, these witnesses stated, has not, in their experience as civic organization members, been delivered with the speed required to notify constituents of such urgent matters. Tr. at 23, 168–70, 197–99, 624. Defendant's witnesses did not refute plaintiffs' evidence as to the speed of mail service in the Town of Greenburgh: while defendant did introduce evidence showing that internal Post Office guidelines require delivery of bulk mail within two days after it arrives at the receiving post office, Tr. at 366 and defendant's Exhibit G, defendant's witnesses admitted that these time standards are frequently not met, Tr. at 422–23, that their compliance figures for White Plains bulk mail rely on a sample of less than 5% of such mail, Tr. at 465–66, and that the standards are especially difficult to achieve in a multi-Post Office region such as the Town of Greenburgh, Tr. at 467.

2. Effectiveness of Alternative Methods of Delivery

The evidence further establishes that none of the alternative means of flyer delivery or other communication suggested by defendant or by the Second Circuit—hanging

material on door knobs, placing flyers under doors, using newspaper or other non-postal boxes affixed to houses or mailbox posts, telephone communication, hand-to-hand delivery, leaving flyers wrapped in a plastic sandwich bag on the doorstep—is nearly as effective as placing civic association flyers in approved mailboxes; so that restriction of plaintiffs' delivery methods to such alternatives also constitutes a serious burden on plaintiffs' ability to communicate with their constituents.

Plaintiffs' witnesses testified at length as to the impracticality of the alternative delivery methods suggested. If civic associations attempt to deliver notices by leaving them outside, unprotected (*i.e.*, by inserting them part way into a door, or under a doormat, or taped onto a door), they testified that the materials are often lost, blown away or damaged or hidden by rain or snow before the occupant has an opportunity to retrieve and read them. Tr. at 41, 106, 150–52, 238, 258–59. They further testified that it is usually impossible for a civic association member to deliver flyers by slipping them *all* the way under the door of a house in these suburban areas because the vast majority of homes have weatherstripping under the outside door or screen door. Tr. at 85. If special measures are employed to protect the flyers from the weather—*i.e.*, use of special plastic bags which fit over a doorknob, or placing the flyers in conventional plastic bags—these measures take time and are relatively expensive for a small volunteer organization, Tr. at 35, 622; moreover, the plastic-wrapped notices may also be blown away or lost, and the special doorknob bags may not be suitable for all the different types of door handles found on houses in the area. Tr. at 35, 87, 150–52. Defendant's own survey, which measured two alternative delivery methods against in-mailbox delivery, demonstrated that nonmailbox delivery methods are markedly less successful in reaching occupants than in mailbox delivery. Tr. at 535; Defendant's Exhibit D–1.

In addition, plaintiffs' witnesses testified that nonmailbox flyer delivery often caused resentment among their constituents because leaving such material outside in plain

sight could be an advertisement to burglars that the house was empty, Tr. at 38, 84–85, 150–52, 258, and because of the litter problem created by flyers blown about the neighborhood, Tr. at 35.

Plaintiffs' witnesses also testified that alternative communication methods which depended on reaching the occupant personally—personal delivery of notices, or phone calls to the occupant's home—had proved to be far less effective than mailbox delivery in reaching constituents, since at any given time the person called or visited might not be home, and since volunteer callers or visitors could not or would not take the time to make several visits or calls to each constituent, while a notice in a constituent's mailbox would reach him at whatever time he came home. Tr. at 42 (hand delivery); 111, 343.

Finally, plaintiffs introduced testimony that only a limited number of residents have newspaper or other non-mailbox receptacles attached to their mailbox posts or to their houses, impeding the effective use of such boxes for distributing civic association materials. Tr. at 620.

3. Effect of Enforcement of § 1725 on Civic Associations

The burdensome nature of the restriction on mailbox delivery on the activities of these civic associations is further established by testimony that, subsequent to the time certain Greenburgh area civic associations received enforcement letters from the Postal Service and began to comply with the requirements of the statute, the effectiveness of those organizations as measured by, among other things, attendance at association meetings and ability to produce attendance at local government functions, has been reduced. Plaintiffs' witnesses further testified that, as a result of their restricted ability to communicate with prospective and current members, the membership of certain Greenburgh civic associations has dropped to the point at which the associations are no longer viable entities. Tr. at 192–93; 344.

B. NEED FOR ENFORCEMENT OF THE STATUTE: THE POSTAL SERVICE'S POSITION

1. Mailbox overcrowding

The evidence does not demonstrate that the crowding of mailboxes due to deposit of civic association notices constitutes an impediment to delivery of the mails. Several civic organization representatives testified on behalf of plaintiffs that they had had considerable experience with mailbox delivery and that they had never observed serious mailbox clutter or overflow when they deposited their organization's flyers. Tr. at 31, 116, 150, 341. The defendant did not introduce evidence on this point and does not appear to be pressing a claim of overcrowding.

2. Security of the mails

Four postal inspectors testified that enforcement of 18 U.S.C. § 1725 was marginally useful in the enforcement of the statutes relating to "internal" mail theft (*i.e.*, theft by Post Office employees) and "external" mail theft (by others), the Private Express Statutes, and the mail fraud and related antifraud statutes. Inspector Edmund H. Mullins testified that if the government could not enforce § 1725, it would interfere with investigations of internal mail theft, since postal patrons might become accustomed to seeing unauthorized persons approaching and opening mailboxes and would not report such incidents as unusual. Inspector Mullins further testified, however, that internal mail theft investigations presently relied on the suspicion generated by persons standing at a mailbox only where the mailbox was placed by itself at some distance from the postal patron's house, Tr. at 139–40, and that enforcement of § 1725 does not eliminate internal mail thefts, Tr. at 143–44.

Inspector Alvin F. Lambden testified at § 1725 aided the enforcement of the Private Express Statutes contained in Title 39, U.S.C. and 18 U.S.C. §§ 1694–96 and of the anti-fraud statutes of 18 U.S.C. §§ 1341–42 and 39 U.S.C. §§ 3005–07: when unstamped matter deposited in mailboxes was brought back to the local Post Office by the mail

carrier, this could lead to prosecution under one of the two sets of statutes. Tr. at 270–71. Inspector Lambden then testified, however, that although he has investigated hundreds of cases under the mail fraud statutes, he has not investigated any fraud cases stemming from or related to a § 1725 investigation, Tr. at 305; and that he has only investigated ten § 1725 cases, all related to commercial users, Tr. at 306–07. Inspector Curtis L. Woodard also testified that § 1725 was an aid to enforcement of the mail fraud statutes, Tr. at 557–69, but admitted that the $300 fine contained in § 1725 for unstamped deposit of material in mailboxes would not constitute a substantial deterrent to a scheme to defraud formulated to avoid the jurisdictional reach of the mail fraud statutes by relying solely on unstamped deposit in mailboxes, Tr. at 561–62.

Inspector Allan P. Bzik testified that the enforcement of § 1725 was important to the success of surveillance operations used in investigations of external mail theft under 18 U.S.C. § 1708, Tr. at 590–91, since § 1725 limited the number of people who could approach a mailbox without arousing suspicion. He further testified, however, that only ten per cent of the arrests under the external theft statute resulted from such surveillance operations, Tr. at 595, and that failure to enforce § 1725 would not be "totally disastrous" to enforcement of the external theft statute, Tr. at 599.

3. Protection of mail revenues

Defendants presented testimony by John M. Nolan, General Manager of the Delivery Division of the Post Office's Northeast Region, on the additional cost to the Postal Service of limiting enforcement of § 1725 to commercial users. Mr. Nolan testified that the government would incur additional expense as a result of the additional time a mail carrier would have to spend in reviewing non-mail matter in the mailbox if certain types of non-mail matter (*i.e.*, civic association material) could be left in the mailbox while other types (*i.e.*, commercial matter) could not. Mr. Nolan estimated that the additional cost to the

government of such a review would be approximately $160,000 on a daily basis nationwide. Tr. at 386–91, 395–96. Mr. Nolan also testified, however, that mail carriers do currently perform certain services requiring examination of material in the mailbox, including processing stamp purchases on behalf of rural postal patrons and review of material in a box for possible violations of the private express statutes. Tr. at 382–83.

Mr. Nolan further testified that § 1725 was currently enforced in a manner which was designed to recoup revenues directly by requiring those persons out of compliance with the statute to pay for the unstamped material found in mailboxes. Tr. at 407, 412. On the related point of future revenues, however, plaintiffs introduced the testimony of civic association members that the response of the majority of civic associations to threatened enforcement of § 1725 was to discontinue delivery of flyers altogether, rather than to switch to mail distribution.

DISCUSSION

The Court concludes that plaintiffs have shown that the burden on their ability to communicate ideas, positions on local issues, and civic information to their constituents flowing from enforcement of § 1725 is substantial. The Court further concludes that the cost to free expression of imposing this burden on plaintiffs outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and protection of the mails.

As the Second Circuit has emphasized, the activities of plaintiffs here—informing community residents about the activities of their local government officials, identifying concerns of local residents to be brought to the attention of those officials, and encouraging residents to participate directly in local government decision-making by attending school board, town, water district and other meetings—fall squarely within the range of activities which the First Amendment was expressly designed to protect. See, *e.g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S.

829, 838 (1978), citing *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966): "'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs'"; *Council of Greenburgh Civic Associations* v. *United States Postal Service*, *supra*, 586 F.2d at 938 (Kaufman, J., concurring) (discussion of "the fundamental right of house-to-house distribution"). Plaintiffs have shown that these activities have been curtailed to a significant degree by observance of the statutory prohibition, that, in the areas in which they operate, non-mailbox methods of delivery are much less satisfactory than mailbox delivery, and that use of the mails to deliver their messages is both financially prohibitive for most civic associations and slow to a degree which significantly diminishes their effectiveness in alerting their constituents to local government meetings and other impending local government activity.

The defendant, on the other hand, has not shown that failure to enforce the statute as to these groups would result in a substantial loss of revenue, or a significant reduction in the government's ability to protect the mails by investigating and prosecuting mail theft, mail fraud, or unauthorized private mail delivery service. The testimony does indicate that the Postal Service receives certain income from enforcement of § 1725, but the defendant has not demonstrated that the percentage of income which comes from enforcement of the statute against civic groups is large when compared with the revenue generated by enforcement against commercial entities, or when viewed in the context of the entire Postal Service budget. In addition, it appears that any projected future postal revenues resulting from enforcement of the statute against civic groups must be discounted by the likelihood that certain civic associations will greatly curtail their activities or even go out of existence altogether, as a result of enforcement of the statute. Moreover, the Court is not convinced that the Postal Service will be forced to expend substantial additional monies for additional time spent by mail

carriers in enforcing § 1725 in the manner plaintiffs suggest. The conclusion drawn from defendant's time-motion study is dubious because defendant's witnesses further testified that mail carriers currently inspect material found in mailboxes for compliance with both § 1725 and the Private Express Statutes, and the defendant has not specified the incremental cost of a determination by the mail carrier during such an inspection that nonstamped material found in a mailbox is civic rather than commercial in nature. Since both commercial and non-commercial materials are usually delivered to every house within a selected area, the postal carrier will ordinarily have to examine a particular piece carefully only once, and will be able to recognize the same piece instantly when he sees it in other mailboxes on his route. Finally, enforcement of § 1725 against civic associations does not appear so necessary or contributive to enforcement of the anti-theft, anti-fraud or Private Express statutes that this interest outweighs the plaintiffs' substantial interest in expedient and economical communication with their constituents.[3]

The Postal Service will accordingly be enjoined from enforcing 18 U.S.C. § 1725 as to plaintiffs, and the Court

[3] Defendant further argues in its submissions that the construction of the statute which plaintiffs' advocate will infringe upon the privacy of homeowners, and that the Court should therefore also weigh this infringement in determining whether the balance tips in favor of plaintiffs. It appears to the Court, however, that while the Postal Service is charged with protecting the privacy of the mail with respect to the activities of their carriers, Tr. at 378, it does not follow that the Postal Service may raise here the privacy interest of homeowners with respect to third parties approaching the homeowners' houses or mailbox posts; and, further, that insofar as those homeowner interests are at issue here, homeowners may continue to exclude unwanted visitors through posting of "no trespassing" signs, enforcement of local trespass laws and similar expedients, so that this factor does not tip the balance in favor of enforcement of § 1725 as to these civic associations.

will enter judgment declaring the statute unconstitutional as applied[4] to plaintiffs.[5]

With respect to the appplication of the statute to "other groups similarly situated," the Court holds that plaintiff Council has standing to raise these claims on behalf of its member organizations, see *NAACP* v. *Button*, 371 U.S. 415, 428, (1963), and finds that plaintiffs have shown that Council's member groups are similarly substantially burdened by enforcement of this statute. The Postal Service will accordingly be enjoined from enforcing 18 U.S.C. § 1725 against plaintiff Council's constituent civic associations as well as against the named plaintiffs, and the Court will enter judgment declaring enforcement of the statute as to such groups to be in violation of the First Amendment.

Plaintiffs shall submit a judgment on fifteen days' notice within ten days of the date of this Opinion and Order.

SO ORDERED.

/s/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
April 24, 1980

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[4] The Court does not find, however, that plaintiffs have established that § 1725 is so significantly aimed at neighborhood civic groups or so unsusceptible to a narrowing construction as to be substantially overbroad within the meaning of Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also discussion in Council of Greenburgh v. U.S. Postal Service, *supra*, 583 F.2d at 938 (Kaufman, J. concurring) as to valid sweep of this statute.

[5] In light of its conclusion that the evidence at trial shows that, even under a more stringent balancing test, plaintiffs are entitled to relief, the Court need not reach the issue of whether, under the alternative theory suggested by Judge Kaufman, plaintiffs have established that mailbox usage is so established as a means of civic group communication as to constitute a public forum whose use may be restricted only as to time, place and manner, see *Grayned*, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 236
Docket 78–6105

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION,
PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES POSTAL SERVICE,
DEFENDANT-APPELLEE

[Decided Oct. 30, 1978]

Before KAUFMAN, *Chief Judge*, SMITH and MESKILL, *Circuit Judges*.

J. JOSEPH SMITH, *Circuit Judge:*

Two "non-partisan civic organizations," threatened with prosecution under 18 U.S.C. § 1725[1] for depositing unstamped notices and pamphlets in approved letter boxes of private homes, sought declaratory and injunctive relief on first amendment grounds in the United States District Court for the Southern District of New York, and moved with supporting affidavits for summary judgment. The court, William C. Conner, *Judge*, dismissed the complaint on a cross-motion under Fed.R.Civ.P. 12(b). We find error in the dismissal at this stage of the case, reverse the order of dismissal and remand for further proceedings.

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[1] 18 U.S.C. § 1725 provides that:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.00.

The motion to dismiss under Rule 12(b) was based on a claimed failure to "state a cause of action," *i.e.*, a failure to state a claim on which relief can be granted. We think, however, that enough is alleged in the complaint to raise the issue of infringement of freedom of communication.

Plaintiffs have alleged that the only practicable method of delivery of their messages to their constituents is hand delivery to the privately-owned mail receptacles of the constituents, and that the enforcement of § 1725 against them deprive them of constitutional rights—including the rights of free speech and free press. The costs and time delays of using the regular mails are claimed to be in practice insurmountable barriers to effective communication by ordinary mail by these plaintiffs. We think these allegations sufficient to survive a Rule 12(b) motion to dismiss.

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cruz* v. *Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972), *citing Conley* v. *Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–102, 2 L.Ed.2d 80 (1957); see also, *Build of Buffalo, Inc.* v. *Sedita*, 441 F.2d 284 (2d Cir. 1971).

The allegations, though general, are sufficient under this standard. If they were thought deficient in any way, permission to amend should have been granted. The parties are entitled to an opportunity to submit proof as to the extent of the handicap[2] to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other.[3] This is a sensitive first amendment

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[2] Whether the cost and delay occasioned by use of the mails are serious burdens, and whether the burdens can be avoided by alternate means, such as the use of door knobs, door handles, under door delivery, etc. Compare, *Rockville Remainder, Inc.* v. *United States Postal Service*, 480 F.2d 4, 7–8 (2d Cir. 1973).

[3] The problems caused by mail box clutter, security considerations, protection of mail revenues, etc.

area. Careful balancing of the need for the statute against the statute's constriction of first amendment rights is called for. See *Martin* v. *City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Schneider* v. *State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). Full development of the facts is essential for the court to strike this balance.

We express no opinion, on this record, on the merits of the claim.

Reversed and remanded.

IRVING R. KAUFMAN, *Chief Judge* (concurring):

I concur in my Brother Smith's clear and succinct opinion. I add these comments only to elaborate on the considerations underlying our conclusion that the two plaintiff civic organizations have stated a constitutionally cognizable claim.

The free expression interest of these associations is not shrouded on obscurity. It is illumined clearly by some of the classic writings on the First Amendment. Freedom of press "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell* v. *Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). And probably the most effective way of ensuring that such literature reaches its intended audience is house-to-house distribution. *Schneider* v. *State*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1939). Indeed, the Supreme Court has declared that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." *Martin* v. *City of Struthers*, 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943). Moreover, the individual householder's right to receive information cannot be ignored. *Id.* at 143, 63 S.Ct. at 865. In sum, "Freedom to distribute information to every citizen whenever he desires to receive it is . . . clearly vital to the preservation of a free society. . . ." *Id.* at 146, 63 S.Ct. at 865.

The two civic associations claim that the only way they can effectively exercise this precious right is by direct deposit of their circulars in the letterboxes of community residents. Thus, the associations are drawn into conflict with the Postal Service, which argues that, unless the leaflets are accompanied by proper postage, this practice violates 18 U.S.C. § 1725. We cannot affirm Judge Conner's order of dismissal unless we hold as a matter of law that, even if the associations prove all their allegations, they have no right to relief. This we have declined to do.

I do not question the power of Congress to establish a monopoly of postal service, *United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978). And it is clear that the exercise of that power includes the authority to provide reasonable regulations for unobstructed access to delivery boxes, *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973). But the postal power, no more than any others delegated to Congress, may not be exercised in a manner that violates the fundamental freedoms guaranteed by the First Amendment. *Blount* v. *Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971).

It is unnecessary to decide now whether deposit of circulars in letterboxes is so established as a means of communication[1] that it may be restricted only by the narrow category of "time, place, and manner" regulations.[2] At the very least, the Postal Service must show that its asserted interest is substantial enough to outweigh the burden on

[1] Affidavits submitted for the associations asserted that this was a common form of communication welcomed by community residents. The legislative history also indicates that it has been a prevalent practice for several decades, *see* 75 *Cong. Rec.* 5575–77 (1932); *see also United States* v. *Brown*, 551 F.2d 236, 240 (8th Cir. 1977) ("non-mail items such as newspapers and circulars are often placed in private mailboxes.")

[2] In assessing the constitutionality of such measures, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

free expression. *E.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 90 L.Ed. 265 (1946). And in scrutinizing that balance, we must keep our thumb on the First Amendment side of the scales, to guarantee that free expression, the keystone of our constitutional structure, will not be shaken. Kalven, *The Concept of the Public Forum*, 1965 Sup.Ct.Rev. 1, 28.

Given the fundamental right of house-to-house distribution, I believe a crucial consideration is whether the associations have any acceptable alternative to direct deposit in letterboxes. They allege that they do not, and at this stage of the proceedings we cannot be certain that their assertion is unfounded. The affidavit submitted by Fritjof Schroder,[3] an experienced community leader active in both associations, claimed that limited access and vagaries of climate together render alternative means of delivery, such as placement of the material behind screen doors or on driveways, inadequate.

Indeed, it appears that Congress itself, when it enacted the predecessor to § 1725, believed that it was severely restricting the possibility of house-to-house delivery of materials covered by the statute. One of the primary purposes of Congress, the legislative history cited by the Postal Service reveals, was to prevent the loss of postal revenue caused by business concerns that were delivering their commercial matter directly to residents' letterboxes. It is unlikely that Congress believed these companies, barred free access to the receptacles, would continue house-to-house delivery to escape postal charges.[4]

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[3] The plaintiff associations submitted affidavits in support of their motion for summary judgment under Fed.R.Civ.P. 56. The Postal Service, which moved for dismissal under Rule 12(b)(6), did not submit affidavits. Judge Conner did not exercise the power to treat the motion as one for summary judgment but grounded his dismissal on Rule 12(b)(6).

[4] The plaintiffs may show on remand that the practice has, indeed, been abandoned. It is interesting to note, moreover, that the plaintiff Saw Mill Valley Civic Association, after being warned by the Postal Service that it was violating § 1725, chose to circulate its next message by mail, although it could not afford to reach the entire community by

Examining the other side of the scales, none of the interests claimed by the Postal Service is so self-evident that mere assertion of it precludes the associations' claim. The Service cites first the need to keep letterboxes both uncluttered and secure. But without searching inquiry we cannot conclude that these interests are so substantial and so imperiled by the practice in question that they outweigh a free expression claim. Moreover, it is crucial to emphasize that § 1725 does not prohibit deposit of mailable matter in letterboxes, but only requires that all matter so deposited bear proper postage. It is not immediately apparent why deposit of a circular, simply because a postage stamp was affixed, would be less cluttering or endangering to a letterbox.

We are brought, then, to the Service's contention that the prohibition of § 1725 is necessary to protect the postal revenue. Insofar as the statute is intended to prevent commercial concerns from conducting their business via an alternative to postal delivery,[5] this is unquestionably a

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this method, rather than utilizing any alternative means of house-to-house distribution. This case, therefore, appears quite different from *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973), where a newspaper company rejected for its own convenience "other alternatives," besides the two-inch hooks it wanted to fix on mailboxes, for delivering its journal. *Id.* at 7.

[5] We need not decide now whether the statute was intended to cover only commercial matter. The question does not appear elementary. It is true that in 1932 the sponsor of a bill worded in terms similar to those of § 1725 opined that it would cover all mailable matter, but he also expressed the belief that social messages "would not be interfered with" and explained that the object of the bill was to prevent the situation "where some large corporation withdraws a volume of mail from the Post Office Department and sets up a service of its own." 75 *Cong. Rec.* 5577 (1932).

In any event, Congress did not enact the 1932 bill. Regulation to similar effect, however, was adopted in 1934 by the Postmaster General. Although a press release listed "political handouts" among the types of matter cluttering mailboxes, the official explanation given by the Third Assistant Postmaster General expressed concern only with the practice of business companies. 55 *Postal Bulletin*, Jan. 5, 1934. And when the predecessor of § 1725 passed soon afterwards, the committee report in the House stated concern only over the practice of

valid interest. Here, however, we are concerned not with bills from public utilities but with civic and political statements of the type that lie at the very core of the First Amendment's concern.[6]

If § 1725 is an attempt to force citizens wishing to make civic or political statements to use the mails rather than exercise their right of house-to-house distribution, it would appear at first blush to be invalid. The Government may not bar access to one forum of expression because it prefers another, *see Thornhill* v. *Alabama*, 310 U.S. 88, 106, 60 S.Ct. 736, 84 L.Ed. 1093 (1949). This rule seems particularly pertinent when citizens are asked to surrender a fast and inexpensive means of communication as a method of compelling them to patronize a slower and more costly governmental monopoly. "Freedom of speech [and] freedom of the press . . . are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

When we enter the realm of the First Amendment, the rule of judicial deference towards legislative action is modified. The judicial action must ensure that the channels of communication are kept open to the widest extent possible, consistent with the public order and safety.

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private delivery adopted by some "[b]usiness concerns, particularly utility companies." H.Rep.No. 709, 73d Cong., 2d Ses[illegible].

A final consideration, especially relevant because the Postal Service insists in its brief that the words of the statute are not in themselves perfectly clear, is the long-established rule that, where possible, a statute should be construed to avoid even a serious question of constitutionality. *E.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 75 L.Ed. 598 (1932).

[6] *See, e.g.*, *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 90 (2d Cir. 1968). The Supreme Court has recognized that expression does not lose its constitutional protection because it occurs in a commercial context, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). Certainly, the Court has never had occasion to suggest that statements of a political and civil nature do not stand on a higher constitutional ground than account statements or other commercial communications. *See id.* at 771-72, 96 S.Ct. 1830, n.24.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT.

[Filed May 20, 1980]

FINAL JUDGMENT

This action having come on for trial before the Court, Honorable William C. Conner, District Judge presiding and the issues having been duly tried and a decision having been duly rendered, it is

ORDERED AND ADJUDGED, that 18 U.S.C. § 1725 is unconstitutional as applied to Beaver Hill Civic Association, Birchwood Civic Association, Broadview Civic Association, Centennial Manor Civic Association, Central Park Ave. Civic Assoc., The Colony Civic Assoc., Cotswold Assoc., Country Club Ridge Civ. Assoc., Dalewood Civic Assoc., Deer Hill Civic Assoc., Greenville Community Council, Donald Park Civic Assoc., Downing Hill Civic Assoc., Dunnings Drive Assoc., East Irvington Assoc., Edgemont Assoc., Elmsford Civic League, Fort Hill Assoc., Fulton Park Assoc., Glenville Taxpayers Assoc., Greenridge Civic Assoc., Hartsdale Acres Civic Assoc., Hartsdale Fels Civic Assoc., Hartsdale Hills Civic Assoc., Hartsdale 4 Corners Assoc., Hartsdale Lawns & Manor C.A., Hartsdale Park Civic Assoc., Hawthorne Way Civic Assoc., High Point Civic Assoc., Hillcrest Park-Ardsley C.A., Hillside-Wyndover Assoc., Hilltop Farms Civic Assoc., Inwood Hill Civic Assoc., Juniper Hill Civic Assoc., Knollwood Manor Assoc., League of Women

Voters, Longview Assoc., Manor Woods Assoc., Mayfair-Knollwood Civic Assoc., Northern Greenville Assoc., Orchard Hill Civic Assoc., Parkway Gardens Assoc., Parkway Homes Civic Assoc., Pinecrest Civic Assoc., Colonial Ridge Civic Assoc., Pinewood Gardens Tenants' Assoc., Saw Mill Valley Civic Assoc., Secor Woods Civic Assoc., Six Acres Assoc., Southern Greenville Assoc., Sprain Road Civic Assoc., Tarryhill Civic Assoc., Washington Ave. Civic Assoc., Westchester Hills Assoc., Winding Road Farms Assoc., Woodhill Civic Assoc., and it is further*

ORDERED AND ADJUDGED, that the United States Postal Service is enjoined from enforcing 18 U.S.C. § 1725 as to the civic organizations identified above; and it is further

ORDERED AND ADJUDGED, that this judgment is stayed for a period of sixty (60) days from the date of its entry.

Dated: New York, New York
May 19, 1980

/s/ WILLIAM C. CONNER
U.S.D.J.

JUDGMENT ENTERED 5/20/80

/s/ RAYMOND F. BURGHARDT
Clerk

* ORDERED AND ADJUDGED, that the Court will retain jurisdiction over this matter for the sole purpose of amending the list of organizations covered by this judgment, upon the application of plaintiffs, to include any civic association in the Town of Greenburgh, County of Westchester, State of New York, which hereafter becomes a member in good standing of the Council of Greenburgh Civic Associations; and it is further

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT.

[Filed June 18, 1980]

NOTICE OF APPEAL

SIR(S):

NOTICE IS HEREBY GIVEN that the defendant United States Postal Service appeals to the Supreme Court of the United States, pursuant to the provisions of Title 28 U.S. Code Sections 1252 and 2101, from the final judgment entered in this action on the 20th day of May, 1980.

Dated: New York, New York
JUNE 18, 1980

Yours, etc.,

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Southern District of New York,
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APPENDIX E

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT

No. 77 Civ. 483 (WCC)

March 29, 1978

MEMORANDUM AND ORDER

CONNER, *District Judge:*

This action, brought by two Westchester County community organizations, challenges the constitutionality of Section 1725 of Title 18, United States Code, and regulations issued thereunder as applied to plaintiffs and "all other similarly situated,"[1] on First Amendment grounds. Section 1725 prohibits deposit of "any mailable matter" in letter boxes without postage. The plaintiff organizations admit that they have violated § 1725 by hand-delivering non-postaged newsletters, brochures and notices regarding various community activities and placing them in the mailboxes of their constituents. In June 1976, plaintiff Saw Mill Civic Association was advised by the Westchester Postmaster that this practice was unlawful, and that fur-

[1] Despite this suggestion that plaintiffs sue in a representative capacity, they have made no motion for class certification; the issues herein are therefore decided only with respect to the named plaintiffs.

ther violations would be prosecuted. In response to an inquiry from plaintiffs' counsel, the Postal Service's Office of General Counsel ruled that the Postmaster had properly applied the statute.

Plaintiffs seek declaratory and injunctive relief, claiming that the enforcement of § 1725 against their distribution of non-commercial literature, which is designed to inform and educate the public, has a "pervasive chilling effect" on the exercise of their First Amendment rights and the rights of those who receive the information they distribute. Plaintiffs maintain that in view of the cost of mailing and delays inherent in the use of the Postal Service, hand delivery of non-postaged material is the only practical and economically feasible means by which they can communicate with the public, and that the continued enforcement of the statute will operate as a prior restraint on speech by effectively preventing distribution of such literature.

Presently before the Court are plaintiffs' motion for summary judgment and defendant's motion to dismiss for failure to state a claim upon which relief may be granted.

The statute in question provides:

> "*Postage unpaid on deposited mail matter*
>
> "Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each offense be fined not more than $300."

18 U.S.C.A. § 1725 (Pocket Part 1977)[2]

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[2]The applicable regulations are contained in the Postal Service Manual, incorporated by reference in 39 C.F.R. § 111.1. They provide in relevant part:

> "Whoever knowingly and willfully deposits any mailable matter such as statements of account, circulars, sale bills, or other like matter, on which no postage has been paid, in any letterbox es-

Plaintiffs contend that the statute does not apply to non-commercial matter. They argue that terms such as "statements of account," and "sale bills," clearly refer to commercial matter, and the legislative history reveals an exclusive concern with

> "[b]usiness concerns, particularly utility companies, [that] have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails and at the same time is resulting in the stuffing of letter boxes with extraneous matter."
>
> H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934).

There is, however, evidence that the Post Office Department, which proposed the legislation, and its Congressional sponsors, intended the statute to apply to non-

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tablished, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300." Postal Service Manual Part 146.21

"Except as permitted in 156.58, any mailable matter not bearing postage found in, or upon, or attached to, or supported by, or hung from, the private mail receptacles described in 151.11, is subject to the payment of same postage as would be paid if carried by mail . . .." Postal Service Manual Part 146.221

"Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, star route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1702, 1705, 1708 and 1725 . . .." Postal Service Manual Part 151.11.

"Except as provided in 156.58, the receptacles described in 151.11 shall be used exclusively for matter which bears postage. This applies to items or matter placed upon, supported by, attached to, hung from, or inserted into, a mail receptacle. Any mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail . . .." Postal Service Manual Part 151.12.

mmercial circulars, such as the community notices distributed by plaintiffs. For example, a proposed amendment that would have inserted the word "commercial" into the statute was rejected in the House debates on the bill. In discussing H.R. 9262—a virtually identical predecessor of the bill eventually passed—the following colloquy took place:

> Mr. BLANTON. Mr. Speaker, I ask recognition on the amendment. I am wondering if the gentleman from New York [Mr. Mead], who is chairman of the committee, would be willing to permit an amendment so as to add the word "commercial" before the word "circular," so that it would apply only to commercial circulars. There are some circulars that it is to the interest of the patrons of the Post Office to receive, which are matters of interest in a local community. For instance, there are thousands of communities where notices out in the country to the effect that a church sociable is going to be held or that there is to be singing on Sunday afternoon are put in the mail boxes. This ought not to apply to things of that kind, and it ought to be limited to commercial circulars.
>
> Mr. MEAD. If the gentleman will yield for a moment, permit me to say it is now contrary to law to deposit such circulars as the gentleman has in mind in letter boxes on a rural route.
>
> Mr. BLANTON. That is exactly what I am complaining about, and I am hoping the gentleman from New York in his great experience and wisdom would see fit to stop it from being a violation of the law, because it is to the interest of all the owners of these boxes to receive these little community notices. Of course it is done in spite of the law, but it ought not to be a violation. They ought to have the right to put a little community notice in the box, and if the gentleman would limit this to commercial circulars he would carry out the purpose of the committee and the purpose of the Post Office Department, and still give these people the right to use their mail boxes for little notices that benefit the entire community.
>
> Mr. MEAD. The gentleman will see that the effort being made by the committee is in another direction

altogether. We are not in this bill concerned with the law that applies to mail boxes on rural routes. We are trying to apply the law that now applies to rural mail boxes apply to city letter boxes.

Mr. BLANTON. What time is a better time than right now to rectify this little injustice to the rural people? Is there any better time than now? I take it that the gentleman has never lived in a rural community.

Mr. MEAD. That is where I live some of the time.

Mr. BLANTON. Then he realizes the problems that beset the rural people. Some of them get their mail only twice a week, people who live away off in the mountains, and it is unfair to say to them that when they have a notice of high importance to the community, it can not be placed in the boxes. Suppose they were getting up a dance for the young people in the community. That is the only way they have to get word about it. They run around the circuit and put the notices in the boxes. Every time they do it they violate the law, but they do it just the same. We ought to stop it from being a violation of the law.

Mr. MEAD. At such time when the committee takes up the matter of revising the law as it applies to rural mail boxes, I shall be glad to consider the gentleman's amendment, but we are considering now only the application of the law to city mail boxes, and that is the only idea conveyed in the bill.

Mr. BLANTON. Does not the gentleman realize that such an amendment is a good one?

Mr. MEAD. Except that it would in my judgment conflict with the purpose of this bill which applies only to city mail boxes.

75 Cong. Rec. 5576 (1932).

In addition, a press release issued at the time the Postmaster General signed an order amending the Postal Regulations in terms similar to those of the statute, specifically mentions "political handouts" as well as "statements of account" and "advertising circulars," and notes the general problem created by all non-postaged material—that

"in many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities this has worked considerable hardship on the carrier with a resultant loss of time." These contemporaneous records indicate that, although non-commercial matter was not the primary focus of Post Office Department or Congressional concern at the time the statute was enacted, it was intended to be within the scope of the statutory prohibition.

Plaintiffs argue, however, that if the statute is held to proscribe the deposit of non-commercial matter in mail boxes, it constitutes an impermissible abridgment of plaintiffs' First Amendment and related Constitutional rights.[3]

There can be no question that the right of freedom of speech and press embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and that door-to-door distribution is one of the most important and effective methods of disseminating ideas and preserving the tradition of free discussion. *Schneider* v. *State*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1938). As the Supreme Court noted in *Martin* v. *Struthers:*

> "Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is

[3] Plaintiffs do not challenge enforcement of the statute with respect to commercial matter. See *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973); *B & M Ltd.* v. *Smith*, 351 F.Supp. 1057 (N.D. Ohio 1972). See also *Bigelow* v. *Virginia*, 421 U.S. 809, 825 n. 10, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

> essential to the poorly financed causes of little people." 319 U.S. 141, 145-46, [63 S.Ct. 862, 865, 87 L.Ed. 1313] (1942) (footnotes omitted).

The right to distribute information in this manner has been upheld against broad permit requirements, *Lovell* v. *Griffin*, *supra*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1941); prohibitions designed to curb litter, *Schneider* v. *State*, *supra*, a prohibition on knocking or ringing a doorbell to summon the occupant, *Martin* v. *Struthers*, *supra;* and a license tax on solicitation, *Murdoch* v. *Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

It is equally well-established, however, that First Amendment rights are not absolute, and that their exercise may be subjected to reasonable limitations "necessary to further significant government interests." *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 [92 S.Ct. 2294, 2303, 33 L.Ed.2d 222] (1972). The Constitution does not guarantee unqualified access to the streets or the doorsteps of individual homes. For example, a prohibition on door-to-door solicitation without the prior consent of the owner was upheld in *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), and the Supreme Court has repeatedly stated that a canvasser may be required to furnish identification or to conform to other requirements reasonably related to the state's interest in preventing fraud, other crimes, or unwarranted inconvenience to residents. See, *e.g.*, *Martin* v. *Struthers*, *supra*, 319 U.S. at 148, 63 S.Ct. 862; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at 306, 60 S.Ct. 900.

In evaluating plaintiffs' claim, therefore, the Court must weigh the substantiality of the reasons advanced in support of the statute against the burden imposed on protected speech. Here the Government has asserted interests that are unquestionably legitimate, and significant. Unhampered access to a mailbox is clearly necessary to the efficient delivery of the mail. In addition, the Government argues that the statute will help to prevent postal theft by assuring that the use of a mailbox by anyone

other than an authorized letter carrier will arouse suspicion.

The task of balancing government interests against First Amendment rights is always difficult, and would perhaps be especially so here if the challenged statute imposed broad restraints on communication, comparable to those held invalid in *Martin* v. *Struthers* or *Schneider* v. *State*. In contrast to the regulations attacked in those cases, however, the statute at issue in this case is "narrowly tailored to further the [Goverment's] legitimate interest," *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116-117, 92 S.Ct. at 2303, and in fact imposes only a minimal burden on plaintiffs' activities.

The statute itself does not purport to *prohibit* door-to-door distribution of plaintiffs' community notices. Despite the asserted interest in protecting postal revenue, neither § 1725 nor any other statute or postal regulation requires the distribution of such non-commercial material through the mail. Nor does the Postal Service seek to prohibit deposit of plaintiffs' literature outside the mailbox. Thus plaintiffs are free to leave community messages on doorknobs, behind screen doors, and in similar locations. The existence of this alternative seriously undermines plaintiffs' claim that enforcement of the statute effectively prohibits their activity by imposing postage costs that volunteer community organizations cannot afford.

Plaintiffs claim—perhaps correctly—that messages left outside the mailbox are less likely to reach their intended audience. But the Constitution does not guarantee plaintiffs an absolute right to the most efficient or effective means of communication. A reasonable limitation on the exercise of First Amendment rights in furtherance of a legitimate and significant government interest may be permissible even if it forces individuals to use alternative means of communication that are somewhat more costly or less convenient. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77, 88-89, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

The Court therefore finds that § 1725 as applied to the distribution of non-commercial literature does not consti-

tute an unwarranted denial or abridgment of plaintiffs' constitutional rights.[4] Defendant's motion is therefore granted and the complaint is dismissed.

SO ORDERED.

[4]The Court rejects plaintiffs' argument, raised for the first time in its reply brief, that the direct deposit of non-postaged mail in letter boxes by civic organizations is protected from regulation under § 1725 by the operation of 18 U.S.C. §§ 1694 and 1696(c). These statutes proscribe distinct activities, and the extension of the exception contained in § 1696(c) to § 1725 would contravene the purposes of § 1725 described above.

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